79564-9

No. _____

IN THE
SUPREME COURT
OF THE STATE OF WASHINGTON

VIRGIL R. MONTGOMERY,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR REVIEW
of Case No. 24123-8 from Division III

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A. Identity of Petitioner

Petitioner, Virgil R. Montgomery, asks this Court to accept review of the court of appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

Mr. Montgomery seeks this Court's review of portions of the unpublished decision of the Court of Appeals of the State of Washington, Division III, No. 24123-8-III, filed November 9, 2006. A copy of the decision is attached.

C. Issues Presented for Review

1. When three State's witnesses opined that the defendant intended to make methamphetamine, did the court of appeals' decision holding no improper opinion testimony was admitted at trial conflict with this Court's decision in *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987)?

2. When the evidence showed Mr. Montgomery and a companion, shopping both together and independently, purchased cold medication, hydrogen peroxide, matches and acetone, was this evidence insufficient to prove Mr. Montgomery intended to manufacture methamphetamine?

3. Did the court of appeals decision upholding both the "missing witness" instruction and the State's argument about the failure of the defendant's grandson and landlord to testify on his behalf conflict with *State v. Blair*, 117 Wn.2d 479,

816 P.2d 718 (1991), when such witnesses were either unimportant and cumulative or no evidence of their availability or corroborative ability was adduced at trial?

4. When the First-Time Offender option of RCW 9.94A.650, by its plain language, "*applies* to offenders who have never been previously convicted of a felony," and this was Mr. Montgomery's first offense, did the court of appeals misinterpret the statute in holding the trial court had no duty to consider it?

5. Alternatively, was trial counsel ineffective in failing to object to the State's witnesses' testimony as to their opinion of the ultimate issue in the case and in failing to inform the court of the applicability of RCW 9.94A.650?

D. Statement of the Case

1. Procedural History

The State charged Mr. Montgomery and a codefendant, Joyce Biby, with possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine, in violation of RCW 69.50.440. CP at 1. Mr. Montgomery was convicted after trial. CP at 28. Although defendant had no prior felonies, the court did not consider the First-Time Offender sentencing option of RCW 9.94A.650. See RP at 270-92.[1] Mr. Montgomery unsuccessfully appealed his

1 Three separately-paginated volumes of transcripts were filed in this case. In this Petition, RP refers to the transcript of the trial and sentencing.

conviction and sentence to the Court of Appeals, Division III.

2. Substantive Facts

Sixty-year-old Mr. Montgomery lived with his son and grandson across the Washington border, in Old Town, Idaho. An ordained minister, he had ceased working to care for his son who was debilitated by a stroke. Mr. Montgomery testified that on the day in question, he drove an acquaintance, 63-year-old Joyce Biby, to Spokane for a mental health appointment in Ms. Biby's son-in-law's car. After the appointment, Ms. Biby was upset. The two decided to go shopping to calm down. Mr. Montgomery sometimes shopped in Spokane for the better selection and prices than are available where he lives. RP at 167-74.

He and Ms. Biby first went to URM. There, Mr. Montgomery bought matches for his wood heater and his son's cigarettes, among other things. He testified that he did not necessarily know what Ms. Biby purchased or why she purchased what she did. RP at 172-75, 180-81. Indeed, during their surveillance, the two detectives involved in this case did not observe Mr. Montgomery and Ms. Biby exchange money for any suspicious purpose. RP at 86, 177.

After URM, the two went to Target, where the detectives began their surveillance. They observed Mr. Montgomery and Ms. Biby enter the store and go directly to the cold medication aisle. Mr. Montgomery pointed to boxes of

cold pills, selecting two and proceeding to check out. He waited while Ms. Biby shopped. RP at 32-35, 81, 112-13, 118, 176. She got a cart and did some shopping, later returning to the cold medicine aisle and choosing two boxes of the medicine Mr. Montgomery had recommended. RP at 34-35, 113.

The detectives found this behavior suspicious. In doing "pretty close to a hundred" methamphetamine investigations, one officer had repeatedly observed groups of people entering stores, buying the same pills, and trying not to appear associated with each other. The other detective described such suspicious actions as entering a store in a group, going in different directions, picking out the items at different times, going to different checkout counters and clerks, leaving the store at different times. Sometimes people leave and change clothes before returning to buy more supplies. People also remove cold pills from packaging immediately and throw the packaging away. RP at 34-36, 40, 111, 113-14.

The chemicals used to manufacture meth include: certain cold pills; red phosphorus from sources such as matchbook striker plates; certain solvents, such as acetone, denatured alcohol, Coleman fuel, paint thinner, "Heat" or toluene; tincture of iodine, hydrogen peroxide, Red Devil Lye, and muriatic acid. RP at 29-31, 54, 109, 142. Cold pills would need to be purchased for each new batch, but the alcohol, iodine and acetone could be used again. RP at 55-57.

The detectives followed the pair to a Dollar Store, where Mr. Montgomery and Ms. Biby purchased dollar reading glasses. The detectives then followed the two shoppers to an adjacent grocery store. Ms. Biby purchased, among other items that did not raise the detective's suspicions, three boxes of matches. RP at 36-38, 114. While Ms. Biby was shopping, Mr. Montgomery purchased a box of Sudafed-24, for a total of three boxes of cold pills he purchased that day. RP at 38, see RP at 177. The Sudafed was a different brand from the others, of a different strength, and contained a different number of pills. RP at 86, 137.

The detectives next followed the two to a K-mart, where Mr. Montgomery and Ms. Biby did not buy anything. They then followed them to a Wal-mart. Mr. Montgomery and the woman again shopped throughout the store, meeting at the checkout lanes and separating to check out. Mr. Montgomery bought a gallon of acetone and Ms. Biby bought two cans of denatured alcohol. RP at 38-39, 115.

The detectives then followed Mr. Montgomery and Ms. Biby to another Target store. There, the two went directly to the cold medication aisle, where Mr. Montgomery pointed to an item and continued shopping. Ms. Biby selected two boxes of cold medicine and checked out. Mr. Montgomery purchased a large bottle of hydrogen peroxide at a different check out line. RP at 41, 117.

The two then drove off, passing two stores that sell tincture of iodine.

When it became apparent that the shoppers had no further local stops to make, the detectives arranged for a patrol car to stop their car. RP at 41-42 & 93-94, 122. The vehicle belonged to a relative of Ms. Biby. From it, the detectives recovered the items they had seen purchased that day plus five additional boxes of matches, a crack pipe from under the passenger seat, and nine store receipts from that day. The crack pipe was not connected to either Mr. Montgomery or Ms. Biby. See RP at 45-46, 60-61, 92, 183-84.

Based on Mr. Montgomery's and Ms. Biby's purchases, one of the detectives gave his opinion as to the ultimate issue in the case: "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine." RP at 40. The other detective, when questioned as to why the shoppers' vehicle was not stopped sooner, gave his belief that Mr. Montgomery intended to make meth: "It's always our hope that if the person buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the actual lab location." RP at 116. The forensic chemist also gave his opinion as to the ultimate question at trial, whether Mr. Montgomery had the intent to manufacture methamphetamine. All the items recovered from both Mr. Montgomery and the woman, taken together, would "lead [him] toward [the conclusion that] this pseudoephedrine is possessed with intent." RP at 160.

However, the items Mr. Montgomery alone purchased were not sufficient for the chemist to reach the same conclusion. RP at 161.

The items recovered were not sufficient to make methamphetamine. Tincture of iodine, Red Devil Lye, and muriatic or sulfuric acid were also necessary. RP at 54 & 95-96. In addition, a source of iodine, a nonpolar solvent, a source of hydrochloric acid, and a chemical like Red Devil Lye would also be required. RP at 147, 153-54, 156. Further, the detectives did not recover any components of a meth lab in the searched vehicle. RP at 99-100, 132, 134, 138.

The detectives did not seek a search warrant to determine whether Mr. Montgomery or his companion were operating a methamphetamine lab because they knew the evidence did not support one. RP at 100-01, 133-34.

Mr. Montgomery explained that he lived in a rented trailer requiring certain repairs. He had an agreement with the owner that he would fix the trailer up. RP at 167. The acetone was for removing some old tiles. RP at 179-80. In addition, he explained that he bought different cold medications in different stores for himself and his son because of his son's special needs. The Sudafed-24 was for his son, who takes several medications and is susceptible to allergic reactions from drug interactions. The Sudafed-24, unavailable at the Target, is safe for his son. He purchased the Target brand medication for himself. RP at 177, 184, 186.

Finally, Mr. Montgomery explained that he bought the hydrogen peroxide for his dog, who had badly cut her leg. RP at 182. Mr. Montgomery's daughter verified that his dog had sliced her foot and that Mr. Montgomery was caring for her. She also confirmed that her brother had had a stroke and was a diagnosed paranoid schizophrenic and that her 14-year-old nephew was in school. RP at 195-200.

On cross examination, the State asked Mr. Montgomery why his son and grandson did not corroborate his testimony about the injured dog, the old tile and the son's medication. Mr. Montgomery explained that his son was not competent and his grandson was in school. RP at 187-89. Given the son's incompetency, the State switched its focus to the absent grandson. RP at 191-92. The State asked no questions about the absence of the landlord. See RP.

The State requested WPIC 5.20, the missing witness instruction, due to the missing grandson. In addition, it argued that the landlord was also missing. The instruction was given over objection. RP at 210-12, 213-21. In closing argument, the State made numerous references to Mr. Montgomery's failure to produce defense witnesses. RP at 237, 239, 240, 241-42, 245, 264. The prosecutor also acknowledged that the burden of proof rests with the State. The defense did not object to the State's remarks. See RP at 230-47, 259-65.

On direct appeal, Mr. Montgomery raised several arguments for reversing

his conviction and sentence. The court ruled against him on all issues. In ruling that the opinion testimony was admissible, the court relied on *Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), to hold that no one made any direct comments on Mr. Montgomery's guilt or innocence. App. at 9-10. It also found the evidence sufficient to support the verdict. App. at 6-8. In finding the missing witness instruction appropriate, the court held that the grandson and landlord could have corroborated Mr. Montgomery's version of the facts and that it was not clear from the record that they were not available to testify. App. at 13. In ruling that the trial court was not required to consider RCW 9.94A.650, the court held that the provision does not impose a duty as it is permissive, not mandatory. App. at 15. In finding no ineffective assistance of counsel, the court ruled, *inter alia*, that counsel was "proactive" and that the trial court was unlikely to have imposed the first-time offender waiver. App. at 17.

E. Argument Why Review Should be Accepted

1. When Three State's Witnesses Opined That Mr. Montgomery Intended to Manufacture Methamphetamine, The Court of Appeals' Decision Holding such Opinion Testimony Admissible Conflicts with This Court's Opinion in *State v. Black*, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987)

When the only issue in this case was Mr. Montgomery's intent, the court of appeals erred in holding that the witnesses who opined that Mr. Montgomery intended to manufacture methamphetamine did not directly comment on his guilt.

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant 'because it "invad[es] the exclusive province of the [jury]."'" *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (officers' statements during pretrial interview not testimony subject to prohibition of opinion testimony), *quoting Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (officer's testimony that he believed defendant charged with driving while intoxicated was intoxicated was admissible); *cf. State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (citations omitted) (officer's testimony that defendant was evasive and a "smart drunk" was opinion that he was hiding guilt and inadmissible).

Contrary to the court of appeals' holding, this case is closer to *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987), than *Seattle v. Heatley*, 70 Wn. App. 573. In *Black*, this Court held that an expert's opinion that the complainant suffered from rape trauma syndrom was not admissible, in part because of the implications the opinion had as to the defendant's guilt. There, the defendant had admitted having sexual contact with the woman and the only issue at trial was whether the contact was consensual. Under those circumstances, the Court held that for a witness presenting herself as an expert to opine that the woman suffered from rape trauma syndrome "constitutes, in essence, a statement that the

defendant is guilty of the crime of rape." *Black*, 109 Wn.2d 336, 349.

For the same reasons the opinion was in admissible in *Black*, it was inadmissible here. Here, parallel to the situation in *Black*, Mr. Montgomery admitted purchasing the pseudoephedrine and the only issue was his intent. The witnesses giving their opinions were two police officers and a forensic chemist, all of whom presented themselves as experienced, if not actually expert, on assessing intent to manufacture methamphetamine. Both an officer and the forensic chemist stated outright that they believed Mr. Montgomery intended to manufacture methamphetamine; the other officer implied the same. Under these circumstances, as was true in *Black*, their opinion testimony constitutes, in essence, the statement that Mr. Montgomery was guilty.

By contrast, while *Heatley* discussed the rules regarding inadmissible opinion testimony, it essentially reiterated the long-standing rule in Washington that witnesses who have had the opportunity to observe an individual can offer an opinion as to the person's level of intoxication. *Heatley*, 70 Wn. App. at 580. The issue there contrasts starkly with the one in the instant case, where the witnesses gave their opinions as to whether the only questionable element of the crime had been satisfied. Indeed, the instant situation is analogous to an officer opining in a murder prosecution that the defendant had intended to kill. Such a

statement goes beyond an opinion as to an ultimate fact to an opinion as to guilt.

Moreover, under these circumstances, the opinion testimony was unfairly prejudicial in violation of ER 403. First, the fact that one of two of the witnesses were police officers is particularly significant: "Testimony from a law enforcement officer may be especially prejudicial because the officer's testimony often carries a special aura of reliability." *Demery*, 144 Wn.2d at 765. Next, the testimony led the jurors to set aside their normal expectations. The ordinary person must not infrequently buy or observe other people buying pseudoephedrine without even considering an illegal intent. Thus, when the jurors in this case were told – by people "in the know" – that Mr. Montgomery's otherwise innocent-seeming actions necessarily showed his illegal intent, the jurors, in effect, were told to substitute the witnesses' judgment for their own. Accordingly, the opinion testimony was unfairly prejudicial and should not have been admitted.

2. When Mr. Montgomery's Conviction Was Based on Mere Suspicion Coupled with the Fear and Outrage That Surround the Methamphetamine Scourge, This Case Presents an Issue of Substantial Public Interest That This Court Should Determine

The evidence at trial was insufficient to prove Mr. Montgomery intended to manufacture methamphetamine. Evidence supports a conviction if, when viewed in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Salinas*,

119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Counsel has found no cases where similar circumstances – the lawful purchase of lawful items that incidentally have unlawful uses, proved the commission of a crime. This situation, where the finding of guilt was based solely upon an activity most citizens engage in nearly daily – a shopping trip, demands the heightened scrutiny of this Court.

Mr. Montgomery purchased two boxes of Target-brand cold medicine and one box of Sudafed-24. In addition, he purchased a gallon of acetone, a large bottle of hydrogen peroxide and several boxes of matches. His shopping companion, shopping independently, purchased four boxes of cold medicine, matches and denatured alcohol. These purchases, taken together, may raise suspicions. However, they cannot support a conclusion beyond a reasonable doubt that Mr. Montgomery intended to manufacture meth.

Indeed, as the State's witnesses agreed, all the ingredients purchased together were insufficient to produce meth. RP at 96-97; RP at 147, 153-54, 156. Although one detective described the purchases as "really close" to having all the necessary ingredients, RP at 54, and the other estimated that the two had purchased 75-80% of the necessary ingredients, RP at 139, in fact, the two had only purchased five of the nine required ingredients. A source of iodine, a chemical similar to Red Devil Lye, muriatic or sulfuric acid, and a nonpolar

solvent were missing yet essential to the manufacture of methamphetamine. RP at 54 & 95-96, 147, 153-54, 156. Accordingly, the circumstantial evidence does not establish criminal intent.

Thus, it was the detectives' observations and conclusions regarding the shopping trip that provided the main evidence of guilt. Particularly damning in the eyes of the officers was the fact that Mr. Montgomery and Ms. Biby entered several different stores together but split up to do their shopping, chose their purchases apart from each other, and selected different check out lines. See RP at 34, 35-36, 40, 102, 113-14. Yet that behavior is perfectly consistent with two people not acting in concert, but merely independently shopping in the same stores at the same time by virtue of the fact that they were in Spokane together. Consistent with that explanation is the fact that the two did not exchange money for any suspicious purpose. RP at 86, 177.

That Mr. Montgomery and his companion made separate purchases at different stores should not be grounds even for suspicion. It is not uncommon for individuals to enter a store together and shop separately. See RP at 36; *State v. Carlson*, 130 Wn. App. 589, 595, 123 P.3d 891 (2005) (noting that fact that individuals entered store together and made separate purchases of legitimate items that also had illicit uses not suspicious or even atypical). Indeed, that such activity

can be proof of guilt is downright scary. *See State v. Schneider*, 32 Kan. App. 2d 258, 80 P.3d 1184 (2003) (suppressing evidence and agreeing with trial court's conclusion that it was "scary" to find articulable suspicion over perfectly legal transaction involving individuals who had separated in store to make purchases of pseudoephedrine products), *cited in Carlson*, 130 Wn. App. at 594.

Moreover, the pair's behavior did not approach the stratagems cited as common among those purchasing ingredients to make meth. RP at 111. Instead, they entered and left stores together, with Mr. Montgomery even waiting in the front of one store for Ms. Biby to finish. They went together to the cold medicine aisle in two of the stores, where Mr. Montgomery pointed out a particular brand. These actions do not describe the behavior of those attempting to conceal a crime.

No additional evidence revealed illicit intent: there was no evidence that either person possessed any of the equipment necessary to make meth; that either possessed or had access to the missing ingredients necessary in its manufacture; or that either was known to sell, manufacture or even use methamphetamine. Indeed, there was no evidence of involvement in illicit drugs at all.

Notably, all of the State's evidence would not have been enough to establish probable cause of the existence of a meth lab. RP at 133-34; *see also* RP at 246. Under these circumstances, it is almost self-evident that the evidence was

insufficient as a matter of law to support the conviction beyond a reasonable doubt. Of course, strictly speaking, the State did not need to prove the existence of a meth lab. Nevertheless, its trial theory was that Mr. Montgomery and Ms. Biby were operating a meth lab. The State maintained that the two purchased ingredients to replace those that had been used up in previous batches. RP at 55-57. Thus, its theory that Mr. Montgomery was replenishing a lab already in existence is inconsistent with the lack of probable cause for the lab itself.

In short, while the evidence here may lead to suspicions regarding Mr. Montgomery's purchases, it in no way supports a finding of guilt beyond a reasonable doubt. Accordingly, this Court should reverse the conviction.

3. The Court of Appeals' Ruling Regarding the Missing Witness Instruction Conflicts with this Court's Opinion in *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991), Requiring Reversal

When neither Mr. Montgomery's grandson nor his landlord could properly be considered missing witnesses, the trial court erred in giving a missing witness instruction. For the same reasons, the prosecutor's closing argument as to these matters was erroneous and prejudicial. A missing witness instruction is warranted when a witness is within the control of the defendant, it is clear the defendant was able to produce the witness, the defendant's testimony unequivocally implies that the absent witness could corroborate his theory of the case, and the witness is not

unimportant and would not give cumulative testimony. *State v. Blair*, 117 Wn.2d 479, 487-89, 816 P.2d 718 (1991) (discussing prosecutorial comment during closing argument about absent defense witnesses). Here, the State based its request for the instruction on Mr. Montgomery's absent fourteen-year-old grandson and landlord. Neither situation justified the instruction under *Blair*.

Most basically, the instruction was not warranted as to the grandson as he was established to be unavailable because he was in school. In addition, he was not an important witnesses and his testimony would have been cumulative. In *Blair*, the Court held that individuals named on slips of paper found in the defendant's room were important, non-cumulative witnesses when the defendant claimed they could have proven his theory of the case. He claimed they owed him money and were not, as the State claimed, drug contacts. The Court noted the importance of a witness's testimony depends on the facts of the case. *Id.* at 489.

In contrast to the absent individuals in *Blair*, the grandson in this case would not have helped Mr. Montgomery's case and Mr. Montgomery did not present him in such a manner. He was a minor-aged relative of the defendant, in his care and dependent upon him due to his age and the disability of his father. Had he been called as a witness, his credibility would have been impugned on these very grounds. Accordingly, his testimony would not have furthered Mr.

Montgomery's case and he was not an important witness. Moreover, while Mr. Montgomery agreed with the State's suggestion that the grandson could have supported his defense, contrary to the situation in *Blair*, he did not volunteer the boy as representing the missing proof of his claims. In addition, the grandson's testimony would have been cumulative. Mr. Montgomery had already given reasons for his purchases and these reasons, unlike the situation with the missing witnesses in *Blair*, were not uniquely known to the grandson.

Next, the absence of the landlord did not justify the instruction when it was not clear Mr. Montgomery would have been able to produce the witness and his testimony did not unequivocally imply that the landlord could corroborate his theory of the case. *See Blair*, 117 Wn.2d at 487-89. In *Blair*, prosecutorial comment about missing witnesses was appropriate when both the defendant and a prosecution witness testified as to the nature of the people named in the "crib sheets." *Blair*, 117 Wn.2d at 482-84. Similarly, in *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990), prosecutorial comment on a missing alibi witness was appropriate when the defendant testified that the individual had testified for him in a previous trial. No similar foundation was laid in this case.

First, the State gave no indication it viewed the landlord as missing during the evidence portion of the trial, creating an unfair surprise for Mr. Montgomery.

Unlike the situation in *Contreras*, where the State questioned the defendant about the missing witness, 57 Wn. App. at 473, here, neither the State nor the defense asked any questions about the landlord. The first time the defense learned about the "missing" landlord was after both sides had rested. RP at 211. Unlike in *Blair*, where there was considerable testimony about the names on the crib sheets, here, there was only one brief reference to a landlord. This situation was manifestly unfair to the defendant, who was not given an opportunity to explain the missing landlord during the evidence portion of the trial.

Next, no evidence as to Mr. Montgomery's ability to produce this witness was introduced. The only testimony in this regard was that Mr. Montgomery lived in a rented trailer and agreed with the owner that he would fix the trailer up. For all that was before the court, the owner of the trailer might have been a completely unavailable witness. When the State asked no questions about the landlord, the defense was not given a chance to explain the absence. Quite possibly the landlord's absence was as justified as that of Mr. Montgomery's son and grandson. Thus, the instruction was not appropriate when it was not clear Mr. Montgomery would have been able to produce the witness. *Blair*, 117 Wn.2d at 489 ("it is the party against whom the rule would operate who is entitled to explain the witness's absence and avoid operation of the inference").

In addition, the instruction was not appropriate because Mr. Montgomery's testimony did not unequivocally imply that the landlord could corroborate his theory of the case. Mr. Montgomery stated that he needed the acetone to remove glue from tiles needing replacement in his trailer. RP at 179-80. He did not say that the landlord directed him to remove the tiles or that the landlord even knew tiles needed replacing. Thus, there was no evidence that the landlord could have corroborated Mr. Montgomery's explanation, except in the most general terms (that Mr. Montgomery lived in the trailer and agreed to fix it up). To the extent the owner could have corroborated the general facts of the rental arrangement, he or she was not an important witness.

For all of these reasons, the court of appeals misapplied this Court's decision in *Blair* and this Court should reverse Mr. Montgomery's conviction.

Because the missing witness instruction was not warranted, the prosecutor's comments during closing argument regarding "missing" witnesses and Mr. Montgomery's failure to corroborate his testimony were inappropriate and prejudicial. RP at 237, 239, 240, 241-42, 245, 264. Thus, the prosecutor's argument regarding the missing witnesses also requires reversal. In addition, the missing witness instruction, combined with the State's closing argument, impermissibly shifted the burden of proof to the defendant, requiring reversal.

See State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (State has burden of proving every element of crime beyond reasonable doubt).

4. The Court of Appeals Misinterpreted the Statute in Holding that the Trial Court was Not Required to Consider the First-time Offender Sentencing Option of RCW 9.94A.650

Mr. Montgomery, with no prior felonies on his record, was eligible for the First-time Offender Waiver of RCW 9.94A.650 and the trial court erred in not considering it. The court of appeals held that the trial court was not required to consider this provision, App. at 15, but the mandatory nature of RCW 9.94A.650 belies this interpretation of the statute. Under the plain language of the statute, a court must consider the provision whether the parties raise it or not. Failure to consider the provision in an applicable case is reversible error. *See State v. McGill*, 112 Wn. App. 95, 98-100, 47 P.3d 173 (2002) (standard range sentence may be appealed if trial court believes it had no discretion to impose a lower sentence or refused to exercise discretion).

While the trial court is not required to impose a sentence under this provision, by the terms of the statute, it is required to *consider* the provision: "*This section applies* to offenders who have never been previously convicted of a felony in this state, federal court, or another state, and who have never participated in a program of deferred prosecution for a felony, and who are convicted of a

felony that is not: [list of enumerated crimes]." RCW 9.94A.650 (emphasis added). Written in mandatory terms, the provision unequivocally applies to all those being sentenced for certain first felonies. Accordingly, its application to Mr. Montgomery is required even though his attorney did not point it out to the court.

That a sentence made pursuant to RCW 9.94A.650 is considered a standard range, unappealable sentence, is additional evidence that a court must consider the provision when it is applicable. RCW 9.94A.585(1). Although potentially significantly lower than the typical standard range sentence, a sentence under this provision is explicitly not an exceptional sentence. RCW 9.94A.585(1). The Legislature's singular treatment of the lower sentences obtained through this statute evidences its intent that application of the provision is a built-in, required part of sentencing a first time offender. Thus, if this Court upholds Mr. Montgomery's conviction, it should remand for appropriate resentencing.

5. The Court of Appeals Erred in Holding That Mr. Montgomery's Trial Counsel Was Not Ineffective

If this Court holds either that it cannot reach the issue regarding the opinion testimony or that Mr. Montgomery's sentence was correctly imposed, then he did not receive effective assistance of counsel. His State and federal constitutional rights to effective counsel were violated by his attorney's failure to 1) object to the State's witnesses' opinions as to Mr. Montgomery's intent and 2)

inform the court of the applicability of RCW 9.94A.650. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance, the defendant must show both that counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability that the result of the proceeding would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Legitimate trial strategy does not constitute ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In this case, counsel's performance was both deficient and prejudicial and cannot be viewed as tactical.

First, counsel's performance at trial was deficient when he failed to object to impermissible testimony. See Point 1, above. The failure to state an objection on the correct grounds may be a basis for finding ineffective assistance of counsel. *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980) (regarding objection to jury instruction). Thus, the failure to state any objection at all when one is required may also be ineffective assistance.

Here, counsel's failure to object was deficient when any competent attorney would have objected to the opinion testimony. It is manifest that witnesses may not testify to the guilt or innocence of the defendant. *Easter*, 130 Wn.2d 228, 242. Such testimony is always inappropriate as it invades the sacred

province of the jury. See *id.* In addition, the failure to object cannot be construed as tactical when counsel objected to similar testimony at other times in the case. See RP at 73, 187. Accordingly, counsel's performance was clearly deficient.

Moreover, but for the deficient performance, Mr. Montgomery would not have been convicted. Had counsel objected to the impermissible testimony, the court would have sustained the objections, as it did when counsel remembered to object. See RP at 73, 187. In addition, the three witnesses' testimony as to their opinions as to Mr. Montgomery's intent was the strongest evidence, arguably the only evidence, of Mr. Montgomery's illicit intent. Accordingly, without the testimony, a conviction would have been impossible. See Points 1 & 2, above. Thus, counsel's deficient performance requires reversal when it prejudiced Mr. Montgomery.

Second, counsel's performance at sentencing was deficient when he failed to inform the court of the applicable law regarding Mr. Montgomery's sentence. *See McGill*, 112 Wn. App. 95. In *McGill*, the court indicated that the failure to inform a court of case law which might justify an exceptional sentence downward merited reversal on ineffective assistance grounds. *Id.* at 101-02; *see also Ermert*, 94 Wn.2d 839; *but see State v. Hernandez-Hernandez*, 104 Wn. App. 263, 15 P.3d 719 (2001) (not ineffective assistance to fail to point out valid ground for

departure). In the instant case, the attorney's error is even greater than existed in *McGill*. Here, the attorney failed to inform the court of a applicable statute, not just case law, that permits a sentence outside the standard range, not a merely downward departure. When the statute provides for incarceration beginning at 90 days, and Mr. Montgomery received a 51-month sentence, the attorney's failure could not have been tactical. When the court imposed the low-end of the sentencing range, it is likely that it would have imposed an even lower sentence had it known it could. Thus, counsel's failure was prejudicial and requires reversal.

For all these reasons, Mr. Montgomery's right to the effective assistance of counsel was violated and this Court should reverse his conviction.

F. Conclusion

For the reasons indicated in Part E, Mr. Montgomery respectfully asks this Court to accept this case for review and reverse his conviction or, in the alternative, to remand for resentencing.

Dated this 7th day of December, 2006.

Respectfully submitted,

Carol Elewski, WSBA # 33647
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on December 7, 2006, I mailed one copy of the attached Petition for Review, postage prepaid, to the attorney for the Respondent, Kevin M. Korsmo, Deputy Prosecuting Attorney, 1100 W. Mallon, Spokane, Washington, 99201.

Carol Elewski

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 24123-8-III
	)	
Respondent,	)	
	)	
v.	)	Division Three
	)	
VIRGIL R. MONTGOMERY,	)	
	)	
Appellant.	)	UNPUBLISHED OPINION

KULIK, J. – Virgil Montgomery was convicted of possession of pseudoephedrine with intent to manufacture methamphetamine. On appeal, Mr. Montgomery asserts the trial court made numerous errors requiring reversal of his conviction. Finding no error by the trial court, and finding sufficient evidence to support Mr. Montgomery's conviction, we affirm.

FACTS

On June 23, 2004, detectives David Knechtel and Daniel Blashill conducted surveillance at a Spokane Valley Target store. Their objective was to identify people who were buying large quantities of cold pills or the household items used to manufacture methamphetamine. The purpose of this investigation was to detect and prevent potential methamphetamine labs.

Detectives Knechtel and Blashill observed Virgil Montgomery and Joyce Biby in the aisle where cold pills were located. Mr. Montgomery appeared to be showing Ms. Biby which pills to purchase by pointing at certain packages. Mr. Montgomery selected two boxes of cold pills and left the aisle. Ms. Biby then picked up two boxes of the pills Mr. Montgomery had designated, and left the aisle a few moments later. The two purchased their items separately, but left the store together.

Although Detective Knechtel acknowledged that it was common for people to go to a store together but make their purchases separately, he became suspicious because of the specific items purchased and the couple's behavior. Based on this suspicion, the detectives decided to follow Mr. Montgomery and Ms. Biby after they left the store.

During their observation of Mr. Montgomery and Ms. Biby, the officers followed the couple to four other stores. The couple purchased cold medication at three different stores. They also purchased matches, paper towels, acetone, denatured alcohol, and hydrogen peroxide. All of these products can be used in the manufacture of methamphetamine. At each of the stores, the two split up and went to different checkout stands to make their purchases.

At this point, Detective Knechtel "felt very strongly" that the two were buying ingredients to manufacture methamphetamine. Report of Proceedings (RP) at 40.

Detective Knechtel based this conclusion on his experience and training, including the fact that he had seen this pattern of behavior before.

Detective Blashill also testified that the couple's behavior comported with common patterns of behavior among those purchasing precursors for the manufacture of methamphetamine. Specifically, this pattern includes coming into the store as a group, going in different directions in the store with each individual picking out different precursor chemicals, and going to different checkout lines in order to make the purchases.

When Mr. Montgomery and Ms. Biby began to travel north from Spokane towards Newport, Detective Knechtel arranged for a marked patrol car to stop their vehicle. The detective arrived a short time after the couple was pulled over. He placed Mr. Montgomery under arrest and then searched his vehicle. Inside Mr. Montgomery's car, the detectives found receipts from nine stores where Mr. Montgomery and Ms. Biby had shopped that day, cold pills, denatured alcohol, acetone, paper towels, additional boxes of matchbooks, and a light bulb that had been fashioned into a "crack pipe" with what appeared to be drug residue in it. RP at 45.

Detective Knechtel testified that boxes of cold pills, matchbooks, hydrogen peroxide, lye, tincture of iodine, denatured alcohol, and acetone were all common ingredients in the manufacture of methamphetamine using the "red phosphorus" method. RP at 29-31. A forensic chemist testified that, while these items individually had

innocuous uses, the quantity of the items found in Mr. Montgomery's vehicle was unusually high. The chemist also testified that the amount of cold medication found was "enough to manufacture a sizeable amount of methamphetamine," and indicated an intent to manufacture methamphetamine. RP at 158.

Detective Knechtel stated that the items found in Mr. Montgomery's vehicle alone were insufficient to manufacture methamphetamine. However, Detective Knechtel explained that only a few additional items were required and that the materials found in the vehicle were very close to all of the necessary ingredients to manufacture methamphetamine. Giving what he felt was a conservative estimate, Detective Knechtel stated that a person could manufacture at least an eighth of an ounce of methamphetamine from the amount of cold medication present in the vehicle.

Mr. Montgomery was charged with possession of pseudoephedrine with intent to manufacture methamphetamine. At trial, Mr. Montgomery testified that the matches that he had purchased were for the wood heater that was the primary source of heat for his mobile home. Mr. Montgomery denied that he and Ms. Biby had a joint shopping plan or that they pooled their money to make the purchases. Mr. Montgomery claimed to have no knowledge as to why Ms. Biby purchased the items that she did.

Mr. Montgomery testified that several of the materials he purchased in Spokane were for repairs on the mobile home that he rented. Mr. Montgomery stated that he had

arranged with his landlord to make repairs. He claimed that he purchased the acetone so he could remove some linoleum and replace the flooring.

Mr. Montgomery told the jury that he lived with his son and grandson and that he was his son's primary care giver. Mr. Montgomery asserted that his son had a medical condition that required Mr. Montgomery to purchase a different type of cold medication for his son than the ones he had previously purchased for himself. Mr. Montgomery further asserted that he purchased the hydrogen peroxide to treat a cut on his dog's leg. Mr. Montgomery's daughter corroborated his assertions regarding the injury to his dog.

In response to Mr. Montgomery's testimony, the State recalled Detective Knechtel who testified that Mr. Montgomery never offered this explanation for the materials in his car to the officers. The trial court allowed this testimony over Mr. Montgomery's objections.

During closing arguments, the State pointed out that Mr. Montgomery did not present the testimony of either his son or grandson to corroborate Mr. Montgomery's account of the purpose for some of his purchases. Mr. Montgomery made no objection to the State's closing remarks. The trial court gave the jury a missing witness instruction over Mr. Montgomery's objection.

Mr. Montgomery was found guilty of possession of pseudoephedrine with intent to manufacture methamphetamine. He was sentenced to a standard range sentence of 51

months. The court was not asked to, and did not consider, the first time offender waiver. Mr. Montgomery timely appeals his conviction and sentence.

ANALYSIS

1. Was there sufficient evidence to establish that Mr. Montgomery had the intent to manufacture methamphetamine?

When a criminal defendant challenges the sufficiency of the evidence, this court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

This court gives equal weight to circumstantial and direct evidence. *Goodman*, 150 Wn.2d at 781. Where a defendant challenges the sufficiency of the evidence of intent, the "'specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.'" *Id.* (quoting *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)).

Generally, the mere act of two people entering a store together and then splitting up to do their shopping is not sufficient evidence of any criminal intent. *See State v. Carlson*, 130 Wn. App. 589, 595, 123 P.3d 891 (2005), *review denied,* 2006 Wash. LEXIS 638. However, "[w]ith respect to shopping practices, the act of entering a store with a companion and then splitting up to purchase pseudoephedrine products is a suspicious activity often seen in methamphetamine manufacture litigation." *Id.* at 594 (internal emphasis omitted). When reviewing the sufficiency of the evidence of intent to manufacture methamphetamine, courts also look to other factors, such as the number and amount of products purchased. *Id.* at 595-97.

Here, Mr. Montgomery and Ms. Biby split up in the same store to purchase pseudoephedrine products. Mr. Montgomery appeared to direct Ms. Biby as to which products to buy. Mr. Montgomery and Ms. Biby purchased more pseudoephedrine products at two other stores as well. Likewise, they purchased additional items that are used in the manufacture of methamphetamine, including acetone, denatured alcohol, hydrogen peroxide, matches, and a potential filtering agent.

A state forensic chemist testified that the quantity of the items was unusually high. There was also expert testimony that these items, when purchased together in the manner that Mr. Montgomery and Ms. Biby acquired them, were strong evidence of the intent to manufacture methamphetamine.

Taken together in the light most favorable to the State, this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Mr. Montgomery possessed the pseudoephedrine products with the intent to manufacture methamphetamine.

Mr. Montgomery asserts that there was insufficient evidence of the intent to manufacture methamphetamine because he was not in possession of *all* of the items required to manufacture methamphetamine. The fact that not all of the precursors for the manufacture of methamphetamine were present is of limited significance. *See, e.g., State v. McPherson*, 111 Wn. App. 747, 758-59, 46 P.3d 284 (2002). Therefore, Mr. Montgomery's argument is without merit.

2. Did the trial court err by allowing the State's witnesses to testify regarding Mr. Montgomery's intent?

Generally, this court will not consider an issue that is raised for the first time on appeal. *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). However, an issue may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." *Id.* (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting RAP 2.5(a)(3))).

Mr. Montgomery asserts for the first time on appeal that, because the State's witnesses testified directly as to the only disputed issue in his trial, this testimony constituted an indirect comment as to the defendant's guilt.

No witness may testify about "his opinion as to the guilt of the defendant, whether by direct statement or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Permitting a witness to express such an opinion invades upon the proper province of the jury. *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). But courts have "expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt." *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (quoting *Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

Assuming that Mr. Montgomery may raise this issue for the first time on appeal, his contention that the State's evidence regarding his intent was improper opinion testimony is without merit. Expert testimony "that is not a direct comment on the defendant's guilt or the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578. In addition, ER 704 provides that "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Here, the disputed testimony regarding intent was based on inferences from the evidence. This evidence included materials found in Mr. Montgomery's vehicle and his manner of acquiring these items. No one made any direct comment on Mr. Montgomery's guilt or innocence, nor were there direct comments on the veracity of any

of the witnesses at trial. The mere fact that the testimony embraced an issue that was ultimately to be determined by the jury – the issue of Mr. Montgomery's intent – does not render that testimony improper under ER 704. The trial court did not err in admitting testimony regarding Mr. Montgomery's intent.

3. Did the State violate Mr. Montgomery's due process rights by commenting on his exercise of the right to remain silent?

The fifth amendment of the United States Constitution and Article I, section 9 of the Washington Constitution protect a criminal defendant from being compelled to testify against him- or herself. "The right against self-incrimination is liberally construed." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify, but it also prevents the State from eliciting comments from other witnesses regarding a defendant's invocation of the right to remain silent. *Id.*

Mr. Montgomery asserts the State elicited an improper comment on his right to remain silent when the prosecution asked why Detective Knechtel did not question Mr. Montgomery and the detective responded that, "It was already made clear to me from

him from the previous day he didn't want to talk to me."[1] RP at 207.

However, it was Mr. Montgomery who initially raised the issue of his invocation of the right to remain silent. In his cross examination of Detective Knechtel, defense counsel for Mr. Montgomery asked whether Mr. Montgomery was read his Miranda warnings upon being pulled over. The following exchange took place:

> Q. Stated he understood his Miranda warnings?
> A. Yes.
> Q. And exercised them?
> A. Yes.
> Q. Chose not to talk to you anymore?
> A. Correct.

RP at 91-92.

This exchange took place before the State's rebuttal testimony that Mr. Montgomery challenges. Therefore, it was Mr. Montgomery who placed the issue of his own invocation of his right to remain silent before the jury. Because Mr. Montgomery was the party who placed his invocation of the right to remain silent into evidence, the doctrine of invited error now precludes him from claiming a constitutional error based on the indirect comments made by the State. A party cannot set up an error at trial, even one

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[1] Mr. Montgomery also appears to argue that the State makes another improper comment on the right to remain silent during its proffer of Detective Knechtel to the court. However, this proffer was made during a bench conference that was held out of the hearing of the jury. As such, these statements were never presented as substantive evidence to the jury and could not have been improper comments on Mr. Montgomery's silence. *See, e.g., State v. Lewis*, 130 Wn.2d 700, 705-07, 927 P.2d 235 (1996).

of constitutional magnitude, and then complain of it on appeal. *See, e.g., State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

4. Did the trial court err by allowing the State to present argument and by instructing the jury on a missing witness; and did this impermissibly shift the burden of proof onto Mr. Montgomery?

Under the "missing witness" doctrine, if a party fails to produce evidence that is under his or her control and that would naturally be in his or her interest to produce, the jury may infer that the evidence would be unfavorable to that party. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). A prosecutor may question a defendant's failure to provide corroboration if the defendant testified about an exculpatory theory at trial. *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209 (1991). However, comment on a missing witness is not proper where a defendant could not produce the witness, or where the missing witness's testimony would be unimportant or cumulative. *Blair*, 117 Wn.2d at 489. The inference is also not proper where the defendant provides an adequate explanation for the witness's absence. *Id.*

Mr. Montgomery testified that his son was not present at trial because he had suffered a stroke that rendered him generally incapable of providing testimony. Mr. Montgomery also testified that his grandson was unavailable to testify at trial because he was in school.

At trial, the State conceded that it would be inappropriate to argue any inference based on the absence of Mr. Montgomery's son, who was disabled and incapable of testifying. However, the State did assert that Mr. Montgomery failed to produce his grandson to corroborate the exculpatory version of events that Mr. Montgomery presented to the jury, including the innocent uses for the matches, the different brands of pseudoephedrine, the acetone, and the hydrogen peroxide, and the agreement with the landlord to make repairs on the mobile home. In short, the State challenged the asserted grounds of unavailability for the grandson.

The State also challenged Mr. Montgomery's failure to produce his landlord. Mr. Montgomery claimed that the acetone was purchased to remove tiles from his rented mobile home. He asserted twice that he was replacing the tiles on the floor pursuant to an agreement with his landlord. The landlord presumably could have corroborated this version of events.

It is not clear from the record that Mr. Montgomery's landlord and grandson were not available to testify at trial. Mr. Montgomery's testimony indicated that his grandson and landlord could corroborate his version of the facts in this case. As such, the trial court did not abuse its discretion when it provided the jury with a missing witness instruction and permitted the State to argue inferences from the missing witnesses.

Mr. Montgomery also claims that the State's missing witness argument, coupled with the trial court's instruction, impermissibly shifted the burden of proof to him. In support of this assertion, Mr. Montgomery relies on *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996). However, in *Fleming* the prosecutor instructed the jury that they were required to find specifically that another witness was lying in order to acquit the defendant, in addition to commenting on a missing witness. *Id.* at 213. It was the combined effect of these two statements that the court found to have impermissibly shifted the burden of proof to the defendant. *Id.* at 214.

Here, the prosecutor did not make any such misstatements about the burden of proof. Moreover, the jury was properly instructed by the trial court that the State had the burden of proving every element of the crime beyond a reasonable doubt and that the jury was to presume that Mr. Montgomery was innocent. This court presumes that the jury followed the trial court's instructions. *See, e.g., State v. Brunson*, 128 Wn.2d 98, 109, 905 P.2d 346 (1995). In the absence of any evidence that the prosecutor specifically gave the jury an incorrect statement of the burden of proof, Mr. Montgomery has failed to establish that the missing witness argument acted to shift the burden of proof to him.

5. Did the trial court err by failing to consider the first-time offender waiver as authorized by RCW 9.94A.650?

Mr. Montgomery received a standard range sentence. Under the Sentencing Reform Act of 1981 (SRA), a standard range sentence cannot be appealed. *See* RCW 9.94A.585(1). As a matter of law, there can be no abuse of the trial court's discretion if it imposes a sentence that falls within the standard range. *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). However, while a defendant cannot challenge a standard range sentence, "the defendant can challenge the procedure by which a sentence within the standard range was imposed." *State v. Watkins*, 86 Wn. App. 852, 854, 939 P.2d 1243 (1997).

In order for a procedural appeal to be allowed under the SRA, "it must be shown that the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so." *Mail*, 121 Wn.2d at 712. The first-time offender waiver provision permits, but does not require, the trial court to waive the imposition of a standard range sentence provided the defendant meets the criteria for a first-time offender. RCW 9.94A.650. Consequently, the trial court had no duty to impose a first-time offender waiver merely because Mr. Montgomery may have qualified for it. Moreover, the trial court cannot be said to have "refused" to exercise its discretion,

since none of the parties asked the court to consider whether a first-time offender waiver was appropriate in this case.

6. Did Mr. Montgomery receive ineffective assistance of counsel?

Effective assistance of counsel is guaranteed by the sixth amendment of the United States Constitution and Article I, Section 22 of the Washington Constitution. A defendant claiming ineffective assistance of counsel is required to make two showings. First, the defendant must demonstrate that counsel's performance was defective. *McFarland*, 127 Wn.2d at 334. This essentially requires a showing that defense counsel's representation "fell below an objective standard of reasonableness based on consideration of all of the circumstances." *Id.* at 334-35. There also must be a showing that the deficient representation prejudiced the defendant, which requires the defendant to prove that, but for counsel's defective representation, the result of the proceeding would be different. *Id.* This court engages in a strong presumption that representation was effective. *Id.* at 335. If either portion of the test is unsatisfied, then the defendant cannot establish ineffective assistance of counsel. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Here, Mr. Montgomery asserts two grounds of ineffective assistance of counsel: the failure to object to the State's testimony regarding Mr. Montgomery's intent and the failure of defense counsel to request a first-time offender waiver. Mr. Montgomery

cannot assert ineffective assistance of counsel for the failure to object to the State's evidence of intent because, as previously noted, this testimony was admissible under ER 704. As such, the failure to object to this admissible evidence was not deficient or unreasonable performance.

The failure of Mr. Montgomery's defense counsel to request a special first-time offender waiver falls closer to the purview of ineffective assistance. Had this waiver been imposed by the trial court, the court might have waived the imposition of Mr. Montgomery's standard range sentence. However, a reading of the entire sentencing hearing reveals that Mr. Montgomery's counsel was proactive in getting Mr. Montgomery a sentence that was at the low end of the sentencing range for his crime.

In addition, Mr. Montgomery has not demonstrated prejudice. He has not shown this court that, but for the failure of his counsel to request it, the trial court would have actually exercised its discretion and imposed the first-time offender waiver. The comments of the court at sentencing indicate that it was unlikely that the trial court would have imposed a first-time offender waiver, given the nature of Mr. Montgomery's offense. The court specifically noted that it considered Mr. Montgomery to be a "threat to the community," and emphasized the insidious effects that the manufacture of methamphetamine has on local communities. RP at 288. Accordingly, it is not likely that the court was inclined to impose a more lenient sentencing alternative under the first-

time offender waiver. Because Mr. Montgomery cannot show that the outcome of the proceeding would likely have been different had his counsel requested the first-time offender sentencing alternative, he has not demonstrated prejudice and his claim of ineffective assistance fails.

7. Do the cumulative errors in this case merit reversal of Mr. Montgomery's conviction?

The cumulative error doctrine is applied in those cases where "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, the doctrine of cumulative error is inapplicable because no trial errors have occurred in this case.

We affirm the conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Kato, J.

Brown, J.